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Trends in Constitutional Law; Teaching and Dissemination of Creation Science

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TRENDS IN CONSTITUTIONAL LAW: THE RIGHT TO TEACH, RECEIVE AND DISSEMINATE CREATION SCIENCE

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ABSTRACT

Many constitutional bases exist to support creationists' right to disseminate creation-science evidences in public educational and other forums. These evidences have a scientific purpose and effect and do not advance religion in contravention of the Establishment Clause. Balanced Treatment laws, as statutory compilations of these constitutional guarantees, will be ruled constitutional in early 1987 by the Supreme Court if proper weight is given to these scientific evidences. First Amendment adjudication precluding government partisanship, discrimination and censorship in the area of origins will increase as the evolutionary establishment intensifies its efforts to extirpate the creationist version of origins. Some instruction as a means of ensuring the teaching and receiving of creation-science information, is a burgeoning alternative to public education.

INTRODUCTION

Concomitant with the growing body of scientific evidences pointing to the sudden creation of matter and life has arisen efforts to teach such data in public schools and other public settings. Creationists, in seeking that all available information on origins be presented, have been terminated from teaching positions, denied degrees, censored from libraries and refereed journals and precluded access to schools under the guise of religious indoctrination.(1)

Anticreationists' claims that creation science is religion and violative of the First Amendment prohibition against government-sponsored establishment of religion, ignores its primarily scientific bases and the comparable religious content of evolution.(2) It must be stressed that each theory is severable into religious and scientific aspects. That the scientific portion of each theory may coincide with tenets of religious belief does not render them in conflict with the Establishment Clause.(3)

While opponents of creationism, who have prevented its inclusion into science classrooms, libraries, museums, etc., have done so by challenging equal time or Balanced Treatment laws as a violation of the Establishment Clause, independent constitutional grounds also should be pursued by creationists including: marketplace of ideas theory; right to receive information; academic freedom; government partisanship; evolution as a religious establishment; anti-book censorship guarantees and alternative methods of ensuring the dissemination of creation science including home education.

A delineation of rights might be applied to the following suggested hypothetical situations:

1. Student Y at state university questions his professor as to statements made by the instructor regarding chemical evolution. Thesis work by student on creationist alternatives receives failing mark. Apply similar facts but conform to high school setting.

2. A visit to the Grand Canyon National Park reveals displays and exhibits indicating the canyon was formed gradually over millions of years by the eroding action of the Colorado River.

3. Inquiries are made to state university Y librarian regarding the lack of creation-science literature (e.g., A CASE FOR CREATION (Friar & Davis)). Research reveals, however,

the latest anticreationist books including HOLY TERROR (Conway & Siegelman) and THE MONKEY BUSINESS (N. Eldridge).

Though I do not claim that the following described rights will be a panacea for the actions of the evolutionary majority, knowledge of the law is essential to those made victims by their tactics.

TEACHING OF CREATION SCIENCE IS CONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE

The teaching and dissemination of creation science is hampered by an all-pervasive secularist world view firmly entrenched in the public realm, particularly public education.(4) Instruction in the scientific evidences for creation, though constrained by these forces, is unequivocally constitutional.(5) As stated, it is without question that creation, as evolution, can be dichotomized into religious and scientific aspects, the latter satisfying the Supreme Court's Tripartite test of the Establishment Clause.

Examples of affirmative scientific evidences for creation include the existence of polonium radiohaloes in precambrian granite rocks (polonium whose half-life is only minutes in duration could not be present in such rocks if they had cooled gradually over millions of years from a molten or semi-molten state) indicating rapid cooling; systematic gaps between different types in the fossil record (no transitional forms as required by Neo-Darwinism); the high pressure in oil wells that could not exist for the duration of time posited by the uniformitarian scenario of the earth's age without leakage and reductions in pressure.(6) Such data clearly points to a sudden creation of matter and life on empirical grounds which does not render the evidence primarily religious in content because it may be consistent with and incidentally touching upon the Genesis account of creation.

References to "Creator" in creation science textbooks no more advocates religious doctrine than Darwin's reference to "Creator" in the ORIGINS OF THE SPECIES renders the latter unsuitable for public school use.(7) The Supreme Court has allowed the Declaration of Independence; the national anthem; pledge to the flag and similar practices containing religious references to "Creator," "creation," the "Power," and "God" to be deemed inherently nonreligious in scope and not an establishment of religion.(8)

The Tripartite test, to obviate a violation of the Establishment Clause, requires teaching content to have (1) primary secular purpose; (2) a primary secular effect that neither advances nor inhibits religion; and (3) no excessive entanglement with religion.(9) Scientific findings that incidentally make reference to religious themes as "Creator," "creation" as a logical consequence of the empirical data do not have a primary purpose or effect of advancing religious doctrine or any theological position. As well, the fact that creation science coincides with the conclusions of Biblical creation does not mean that there exists an excessive entanglement of secular and religious precepts.(10)

Scientific data pointing to a creation account is as tangengial to religious doctrine as data employed to explain the origin of life and matter by naturalistic means is to a belief in self-existing, progressively-directed matter. Thus, while evolution taken as an all-encompassing world view embodies pantheism as its central theme, itself a religious statement ("Darwinism...reduce(s) God to the level of imminent world process or elevating the created order to the status of divinity"),(11) an adherence to scientific data and interpretation alone remain a secular-oriented endeavor as does the pursuit of creation science.

Furthermore, the Supreme Court has defined religion as an ultimate concern; that is, a sincerely held belief or belief system providing meaning and orientation to life.(12) Creation science offers only empirical findings, not an ultimate perspective of life. To infuse this information with the elements of belief and meaning requires linkage with Biblical Creationism.

Arguably, the need for the three-pronged test of the Establishment Clause may be waning in that the Supreme Court has shown indications of interpreting the clause as it was intended per its legislative history.(13) The Court has recently employed a historical test that upholds a law if it would have been deemed constitutional at the founding of the Establishment Clause.(14) The First Congress passed a resolution to set aside a day of Thanksgiving to acknowledge "Almighty God."(15) The Congress of 1789 also authorized the appointment of paid chaplains.(16) These and other practices contemporaneous with the passage of the First Amendment and Establishment Clause indicate that incidental references to religious terms and concepts are constitutional.

MARKETPLACE OF IDEAS

First enunciated in the 1919 conspiracy-espionage case of Abrams v. United States in dissent, Justice Holmes coined the term "marketplace of ideas" as the most propitious means

to achieve truth. Encouraging the free exchange of ideas, so the theory goes, would allow the most credible viewpoints, those most powerful in content, to survive the potpourri of ideas being espoused.(17)

Within forty years the marketplace concept became the majority view. Teacher and student alike must be free to inquire and evaluate divergent points of view.(18) In Keyishian v. Bd. of Regents, the Court propounded:

> (T)hat freedom is...a special concern of the First Amendment which does not tolerate laws that cast a pall of orthodoxy over the classroom...The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues (rather) than through any kind of authoritative selection.'(19)

In the teaching of origins, this "marketplace of ideas" would be limited to two basic constructs--creation and evolution.(20)

Free exchange of scientific information on origins would encourage the quest for scientific truth within the scientific community. Scientists would draw upon varying theories and test them according to the scientific method. The suppression of this information actually inhibits the process of science, since all viewpoints are not readily accessible and therefore cannot be properly scrutinized.

RIGHT TO KNOW

Creationists' right to know/receive information and ideas is violated by the exclusion from the classroom of scientific data pointing to a sudden origin for matter and life. First set forth in a postal regulation case restricting subversive foreign mailings from reaching their American recipients,(21) the Court has since stated that "in a variety of contexts (a) First Amendment right to receive information and ideas" is now well established.(22)

It is the right of the public to receive suitable access to scientific, political, aesthetic, moral and other ideas.(23) It is irrelevant that the recipient has alternative sources of obtaining the information if the right to receive should be provided in the setting at issue.(24) Anticreationists, who facetiously call for its presentation in social studies, comparative religion and the like would violate the right to know/receive information. The right extends to communication, source and its recipients.(25)

ACADEMIC FREEDOM

Largely inclusive with marketplace of ideas and right to know, a right to academic freedom, nevertheless, is a separate First Amendment basis to pursue the dissemination of creation science. Available to teacher and student, academic freedom encompasses the right of expression to lecture, publish, inquire and pursue knowledge by the instructor and the freedom to explore, receive and debate all areas of a subject by the student.(26) It includes the right to teach a minority viewpoint like creationism and the right to speak out on such issues without relinquishing one's public employment in reprisal.(27)

The public employment of school teachers and state university professors cannot be terminated where the basis for the dismissal is First Amendment free speech and expression.(28) The Supreme Court has soundly rejected the notion that public employment may be sacrified as a consequence of speaking out on a subject.(29)

Teachers and professors who teach creation science must establish that any dismissal or failure to renew a contract is motivated by such constitutionally-protected conduct. The evidence must sufficiently point to the exercise of these First Amendment rights as the basis for termination by a school board or university and not to factors relating to the job--performance, personnel difficulties, efficiency, etc.

Where the evidence shows that teaching creation science was the motivation for the termination, then the burden of proof shifts to the school board/university to show by a preponderance of the evidence standard that the dismissal was not for speaking out.(30) Under the above test, the instructor need only show that the dismissal emanates from First Amendment rights to academic freedom. Once shown, the burden is on the school to prove that it would have reached the same decision in the absence of the protected conduct.(31)

BALANCED TREATMENT

In 1981 the legislatures of Louisiana and Arkansas passed statutes allowing for the teaching of creation science alongside evolution in the public schools of those states.(32) Bills

of similar import have been introduced in the legislatures of over twenty states.(33)

These laws ensure by statutory edict that the above rights to academic freedom, right to know, etc., would not be denied. Review of the Arkansas and Louisiana statutes reveals this to be the principal basis for their passage.(34)

Incredibly, the federal judiciary in reviewing the Arkansas law, voided in early 1982 as an establishment of religion, ignored the plain meaning of the statute.(35) The McLean court erroneously disregarded the statutory statements of secular and scientific purpose and academic freedom set forth in the Arkansas law. The High Court has stated that a statute's statement of purpose is to be given great deference.(36) Further, the McLean court refused to acknowledge the religious content of evolution theory, contenting itself with unsupportable generalizations: "(I)t is clearly established in the case-law and perhaps also in common sense, that evolution is not a religion."(37)

Such hyperbole reflects a decision-maker unwilling to fairly assess the Balanced Treatment issue. An equitable evaluation of the equal time question would have acknowledged the religious and scientific parameters of both theories, and held the scientific/secular portion of each to be constitutionally permitted in the public education system.

Taking the ominous McLean decision as precedent, the district court in Aquillard v. Edwards granted summary judgment claiming that no factual dispute with regard to Balanced Treatment (summary judgment means that no factual dispute is deemed to exist in a case and the court "summarily" decides in one side's favor without trial).(38) The court improperly rejected the vast array of scientific evidence brought forward by the state on behalf of the law, claiming it was primarily religious in scope and in violation of the Establishment Clause.

On appeal the federal Fifth Circuit Court of Appeals in addressing the Louisiana law, voided its implementation by presupposing the motives of the legislators who sponsored it, dismissing the purpose clause of the law as self-serving.(39) The court erroneously concluded that the Louisiana law was primarily religious and a violation of the Establishment Clause by infusing into the ruling its own understanding of the history of the creation/evolution debate as a contest between "secular scientists" and "religious fundamentalists."(40) Hence, the court declares Balanced Treatment invalid not on the basis of the scientific evidence before it but on the basis of its subjective predispositions. There must be sufficient evidence that the motives of those who passed this statute did so primarily for advancing religion.(41) The court record shows that those who brought this law into being did so to disseminate scientific proofs for creation. Where a statute is shown to only incidentally or partly make reference to religion, it is constitutional.(42)

Despite this, creationists should be encouraged. The Louisiana variant of Balanced Treatment, while ruled unconstitutional by the Fifth Circuit, will be heard by the United States Supreme Court in November 1986, due largely to a vigorous dissent by the Fifth Circuit sitting en banc (all judges of circuit review case).

The en banc dissent is the first judicial recognition in this half of the Twentieth Century in favor of presenting both views of origins.(43) Clarence Darrow stated that truth is truth and can always be taught whether tending toward a religious view or not.(44)

This is precisely the premise of the en banc dissent--truth presented in the context of the public schools while not calling for the advancement of religious truth, at minimum mandates that each position on origins be taught and that all available scientific evidence be brought to the fore:

> (T)he Louisiana statute requires no more than that neither theory about the origins of life and matter be misrepresented as fact and that if scientific evidence supporting either view of how these things came about be presented in public schools, that the other must be--so that within the reasonable limits of the curriculum, the subject of origins will be discussed in a balanced manner if it is discussed at all. I see nothing illiberal about such a requirement... It comes as news to me, however, that the constitution forbids a state to require the teaching of truth--any truth, for any purpose, and whatever the effect of teaching it may be.(45)

Furthermore, the en banc dissent forcefully condemns the acts of the majority, stating that to presuppose a different legislative purpose from that plainly set forth in the statute is to supplant one's personal, subjective ideas over those of the law.(46) Such raw exercise of judicial power exceeds the proper authority of the judicial branch and violates the Separation of Powers principle.

PROSPECTS FOR CREATIONISTS' RIGHT TO DISSEMINATE

If such constitutional precedents exist, why have creationists been unsuccessful in infusing creation science (apart from instances where creationism is voluntarily adopted by school board or university) into the state-supported classroom? First, although the Supreme Court decisions cited establish broad constitutional bases for allowing divergent points of view to be taught and received in the classroom, the cases involve fact patterns different from a purely creationist paradigm. The prospective Supreme Court decision in Aquillard will resolve this by directly deciding the right to teach creationism in public schools. The decision will be favorable if the Court gives sufficient weight to the scientific evidences in the court record. If so, then creation science will be viewed as a primarily scientific endeavor and pass any constitutional hurdles.

Secondly, the Supreme Court has not taken a consistent approach to its own interpretation of the First Amendment. For example, while declaring Secular Humanism to be a religion,(47) the Court has embraced evolutionary orthodoxy in asserting evolution to be science and not religion subject to the Establishment Clause.(48)

GOVERNMENT PARTISANSHIP

One need only walk into the Smithsonian, visit the Grand Canyon, receive an education at a public school or university to discern the lack of available information regarding creation science. Yet, one central tenet of the First Amendment is that government remain neutral in the marketplace of ideas.(49) All ideas, judicially recognized as being equal in status, must be given a full opportunity to be disseminated.(50)

This is not to say that government cannot through its officials exercise First Amendment speech guarantees. Government officials daily exercise these rights by communicating and informing the citizenry on various topics. But where the purpose of government communications exceeds that of informant, and assumes the role of persuader, government is no longer neutral and has engaged in official partisanship.

Such partisanship is particularly insidious where it excludes competing viewpoints in the area of origins. Government favoritism of evolution is expressly prohibited by the First Amendment for its effect is to limit the stock of information from which members of the public may draw.(51) Such government endorsement appears to bear the stamp of authority allowing a few to gain unmerited public acceptance based on the source and not the content.

The 1984 distribution of the National Academy of Science pamphlet Science and Creationism is an instance of government partisanship for Neo-Darwinism.(52) This blatantly anticreationist booklet was sent to selected high schools and colleges nationwide. One excerpt from the pamphlet indicates its bias:

> (T)he Academy states unequivocally that the tenets of 'creation science' are not supported by scientific evidence, that creationism has no place in a science curriculum at any level, that its proposed teaching would be impossible...(53)

Though lacking convincing support to debunk creation, the pamphlet goes on to declare that the evidence for evolution is overwhelming, citing such tenuous "proof" as "cumulative geochronological evidence," archaeopteryx as a transitional form and the outmoded homology sequences to name a few.(54)

While NAS, incorporated in 1863 by an Act of Congress, is considered a private foundation, over 90% of its funding is appropriated directly by Congress! In such circumstances the private entity is considered to have a sufficient nexus or "contact" with government to subject it to the same constraints on limiting constitutional rights.(55) This is especially so where the "contacts" are direct subsidy or aid. Where the private entity is shown to have such economic contacts it will be deemed an agent of government.(56)

Factors the courts take into account include the nature and quality of the aid, the type of entity involved, the effect on constitutional rights, etc.(57) Such government "agencies" must be neutral in the marketplace of ideas, provide access to all ideas in the area of origins and promote academic freedom. From the foregoing, it is highly probable that litigation against NAS would subject it to the same limitations on partisanship as the government itself.

CENSORSHIP: PUBLIC LIBRARIES

A library computer search conducted in August and December 1983 to determine the extent of creationist literature at state universities and public high schools revealed the virtual

absence of books dealing with creation science.(58) In constrast, anticreationist books were well represented.

Censorship of books involves both removal of existing books from the shelves and the basis of selection of new books. As to the former, no absolute discretion rests with the local school board to remove books from a library because of content. Such removal based on content violates students' First Amendment right to receive information and academic freedom.(59) Instances where creationist materials are purged from public libraries would invoke First Amendment objections.

The selection process, more subtle to detect as well as prove, nevertheless invokes all the constitutional rights referred to. The computer search clearly shows that in public schools and libraries nationwide creation science books are being censored out of libraries.

Creationists can make a case for book selection censorship where it can be shown that such decisions are based upon personal, subjective predilections rather than reasonably objective selection standards.(60) Criteria would include purpose of the library (e.g., general or specific circulation); characteristics of readership; financial status, etc. A stronger case can be made for selection censorship at a library devoted to biology for graduate students, for example, than a general high school library.

Where such factors are present at public educational or other public forums, not only are First Amendment rights cited above at issue but also issues of Due Process, Equal Protection, and Prior Restraint can be raised.(61) Authors of creation science literature should be particularly alert to whether objective standards exist in a given library setting and if so, the extent to which such guidelines are being followed.

EVOLUTION AS AN ESTABLISHMENT OF RELIGION

Litigation has focused on challenging museum exhibits and similar presentations of evolution as a violation of the Establishment Clause, evolution being posited as a religion of Secular Humanism.(62) Test cases have shown the courts unwilling, however, to recognize the religious elements inherent in the evolutionary construct. Applied to the three-pronged test of the Establishment Clause, evolution is held to advance a solid secular purpose and effect of diffusing scientific learning and not to be an entanglement with religion.(63) One court stated that whether Darwinism rests wholly or partly on faith did not change its scientific nature!(64) While such attempts have heretofore been unsuccessful in the courts, different forums may provide a favorable result.

ALTERNATIVES: HOME EDUCATION

Those wishing to ensure that their children will not be indoctrinated in Neo-Darwinism in the public schools may choose private schools, a right guaranteed them,(65) or teach at home.

For those parents who choose private school, diligence must be exercised to ensure that the subject matter and curriculum are not synonymous with those in use in the majority of public schools. Frequently private schools, whatever their religious orientation, use textbooks from the large secular publishers to save time and money (these are the most readily available) or to conform to state minimum standards. Also, state certification standards may result in private school teachers instructing in the same methods and philosophy as their public counterparts. Where the children are being exposed to the same proevolution philosophy, textbooks, and curriculum it matters little that the setting is different.

Home education, permissible in all but a handful of states, permits instruction of children by their parents or by tutor. State restrictions vary but usually include requirements of baccalaureate degree, teacher's certificate, and minimum standards for subjects and over-all curriculum.

Though the state has largely controlled the education of children through compulsory attendance laws for over a century, it is well established in our jurisprudence that the primary responsibility for the educating of children rests with parents.(66) It includes the right of parental liberty; First Amendment guarantees of freedom of conscience; Free Exercise of Religion (if pursuing home education for religious reasons); the right to be left alone by the state (privacy); and the Ninth Amendment (rights not exhaustively outlined in other provisions of the Bill of Rights reserved to the people).(67)

These constitutional guarantees are deemed fundamental invoking what is known as the compelling interest test.(68) For the state to have a compelling interest in limiting home education, it must show that a quality education cannot be received in the home school setting and that public schools (or certified private schools) are the only forum capable of

providing an adequate education. The evidence, however, clearly shows that the state cannot satisfy its compelling interest burden--home taught students on the average excel in every academic area while large numbers of high school graduates are unable to perform even rudimentary reading, writing and mathematical skills.(69)

Although many states require parents who wish to home instruct to possess a baccalaureate degree and often a teacher's certificate as well, courts have held that such hurdles have no rational relation to the quality of education being offered home-taught children.(70) Courts are increasingly adopting the following two-pronged test as a prerequisite for parents to home educate: (1) curriculum must contemplate reasonable educational standards and (2) the instructor must be competent to teach those subjects.(71)

Since most parents enroll their children in a "satellite" school (children "enroll" in central private school and make use of resources, curriculum while remaining physically at home), the first level is easily satisfied. Parent/teacher competency can best be achieved through administering standardized tests to the home instructed students. Such test results, though only one indicator, measure the progress of the student and to a certain degree the teaching ability of the instructor. One study has shown that most home schooled youngsters achieve higher than national averages on standardized measures.(72)

As the burgeoning home school movement intensifies, this common sense test will be adopted nationwide. Home instruction will increasingly be adopted for higher education as well, as computer and high technology become all-pervasive.(73)

CONCLUSION

In conclusion:

> The search for knowledge and understanding of the physical universe of the living things that inhabit it should be conducted under conditions of intellectual freedom, without religious, political or ideological restrictions...(F)reedom of inquiry and dissemination of ideas require that those so engaged be free to search where their inquiry leads...without fear of political censorship and without fear of retribution in consequence of (the) unpopularity of their conclusions. Those who challenge existing theories must be protected from retalitory reactions.(74)

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